United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7313

To be argued by
MICHAEL B. TARGOFF

B
1/5

In The

United States Court of Appeals

For The Second Circuit

G & S DEVELOPMENT CORPORATION, FRANK J. GRESKOVICH and BENJAMIN L. STALNAKER,

Plaintiffs-Appellants,

-against-

LINCOLN FIRST REAL ESTATE CREDIT CORPORATION and NATIONAL BANK OF WESTCHESTER,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR PLAINTIFFS-APPELLANTS

WILLKIE FARR & GALLAGHER
Attorneys for Plaintiffs-Appellants
1 Chase Manhattan Plaza
New York, New York 10005
(212) 248-1000

MICHAEL B. TARGOFF
PAULA J. MUELLER
Of Counsel

(10292)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

Table of Authorities (Continued)

In the United States Court of Appeals
For the Second Circuit
Docket No. 76-7313

-----------------------------------x

G&S DEVELOPMENT CORPORATION, FRANK J. GRESKOVICH and BENJAMIN L. STALNAKER, :

Plaintiffs-Appellants :

vs. :

LINCOLN FIRST REAL ESTATE CREDIT and NATIONAL BANK OF WESTCHESTER, :

Defendants-Appellees :

-----------------------------------x

BRIEF OF PLAINTIFF-APPELLANTS

Plaintiffs-Appellants ("plaintiffs") G&S Development Corporation ("G&S"), Frank J. Greskovich ("Greskovich") and Benjamin L. Stalnaker ("Stalnaker") appeal from a judgment of the United States District Court for the Southern District of New York, per the Honorable Irving Ben Cooper, directing a verdict dismissing plaintiffs' complaint and awarding defendants-appellees ("defendants") Lincoln First Real Estate Credit Corporation ("LFRECC") and National Bank of Westchester ("NBW") judgment on their counterclaim.

Issues on Appeal

1. Whether the District Court erred in holding as a matter of law that a commercial lender was entitled to retain $180,000 paid as a commitment fee by a prospective borrower for a construction loan and permanent financing notwithstanding that the lender determined that it would not extend the loans, where:

(a) Recovery of liquidated damages was improper since the failure to close was solely attributable to the lender;

(b) The lender had not performed its obligations under the commitment contracts so as to earn the fee; and

(c) The Court had determined that, although the borrower was bound, the lender undertook no binding obligations on its part.

2. Whether the District Court erred by granting defendants a directed verdict dismissing plaintiffs' complaint and granting defendants judgment on their counterclaim by denying plaintiffs the opportunity to introduce evidence on their theory of estoppel and on their efforts to show the intention of the parties at the time they entered into commitment contracts and a promissory note by ruling that:

(a) The parol evidence rule and the statute of frauds precluded the introduction of evidence to show plaintiffs' reliance on defendants' representations that a condition precedent to the commitment contracts was satisfied, waived or excused;

(b) The commitment contracts were clear and unambiguous;

(c) Events subsequent to the signing of the commitment contracts were irrelevant; and

(d) The parol evidence rule and § 15-301(1) New York Gen. Oblig. Law preclude the introduction of extrinsic evidence to show the circumstances surrounding the execution of the promissory note.

STATEMENT OF THE CASE

Preliminary Statement

This is an action for damages and other relief arising out of the failure of two loan commitment contracts for construction and permanent financing of a proposed hospital in Pensacola, Florida to culminate in the extension of a loan. Based on certain representations made by defendants as to the certainty of these loans, plaintiffs paid a $180,000

commitment fee and with the assistance and encouragement of defendants borrowed $300,000 from defendant NBW secured by a promissory note and spent the money on the hospital project. When the loan failed to materialize and alternative financing could not be secured, plaintiffs sued for damages, cancellation of the promissory note and a refund of the $180,000 commitment fee. Defendants counterclaimed for the outstanding indebtedness on the $300,000 promissory note.

<u>The Parties</u>

Plaintiff Stalnaker is a surgeon specializing in obstetrics and gynecology who practices in Pensacola, Florida. Plaintiff Greskovich is also a surgeon who practices in the Pensacola area, whose speciality is oral surgery (139A-140A).* Stalnaker and Greskovich organized G&S for the purpose of constructing a general diagnostic and treatment hospital to serve the Pensacola, Florida community (71A).

Defendant LFRECC is a New York corporation which is in the business of real estate and construction financing (158A). LFRECC was the signatory party to both the commitment contracts to provide financing to plaintiffs (21A-27A).

---

* References bearing the suffix letters "A" are to the plaintiffs' appendix in the appeal herein. References to "Rec. D." followed by a number are to documents contained in the Record on Appeal.

Defendant NBW is a national banking association affiliated with LFRECC which conducts business in White Plains, New York (33A). NBW loaned plaintiffs $300,000 secured by a promissory note of G&S and personal guarantees of Stalnaker and Greskovich (34A); NBW's loan was transferred to LFRECC prior to the commencement of the lawsuit (50A).

The Proceedings Below

The trial in this action commenced on April 5, 1976 with the selection of a jury (127A).* The trial began with an opening statement by plaintiffs' attorney, Michael B. Targoff, Esq. summarizing the issues in the case and the evidence plaintiffs would seek to introduce (128A-152A). At the close of plaintiffs' opening statement, defendants moved for a directed verdict dismissing the complaint for failure to state a cause of action on two grounds: 1) failure of a condition precedent to a contract; and 2) inability to prove terms of a contract at variance with the written terms thereof because of the parol evidence rule and the Statute of frauds (152A, 267A). Defendants also moved for a directed verdict on their counterclaim (267A).

* Prior to the commencement of the trial, both parties submitted a pre-trial order (32A), trial memoranda (69A, Rec. D.34) and requests to charge (102 A, Rec. D.35).

Before the first witness was called, the District Court rendered a decision granting defendants' motion (283A). For purposes of the record below and on this appeal, both parties with the approval of the Court, agreed that plaintiffs would be deemed to have offered proof supportive of all plaintiffs' allegations made in the opening statements, arguments of counsel on the motion for a directed verdict, the pleadings, the trial memoranda, requests to charge and the exhibits marked at trial (245A, 249A, 250A, 260A, 264A, 266A, 269A). Following the stipulation on the offer of proof, the District Court read a memorandum decision into the record (274A-283A).

The Court found that the commitment contracts were subject to conditions precedent which were never fulfilled (167A). One condition was that the loan would have to be approved by the Executive Loan Screening Committee ("Loan Committee") (22A, 167A). Plaintiffs argued that they should be permitted to prove by oral testimony that this condition was waived, satisfied or that defendants are estopped from asserting its non-fulfillment (38A, 83A-87A, 167A). Ruling that this evidence was barred by the parol evidence rule, the District Court held that evidence that "committee approval had been waived or satisfied or was merely formality is clearly inadmissible since the direct effect of admission of such proof would be to contradict, vary and subtract from

the terms of the written December 26th agreements" (168A, 276A).* The District Court also held that the statute of frauds, § 5-703 N.Y. Gen. Oblig. Law, would render inadmissible statements allegedly made by an officer of LFRECC concerning the condition of Loan Committee approval (277A).

As part of their case for estoppel, plaintiffs also sought to introduce evidence on events which occurred

---

* When apprised of the Court's views on this issue, plaintiffs requested leave to and did submit a supplemental memorandum of law dealing with the inapplicability of the parol evidence rule and the statute of frauds in the context of an agreement of equitable estoppel (167A). While the Court took the position that the estoppel theory advanced in the supplemental memorandum "was not at all touched upon in the original papers and is now being advanced ... for the first time", the record is clearly to the contrary. Plaintiffs' pre-trial order (38A), pre-trial memorandum (83A) and requests to charge (109A-110A) all previously filed, and the correspondence between Michael B. Targoff, Esq. and the Hon. Irving Ben Cooper (287A-291A) all discuss the legal basis for the estoppel theory and its application to this case. At a later point in the argument, the Court contended that plaintiffs' estoppel theory could be distinguished on the basis of when the waiver or excuse of the condition occurred and that plaintiffs had not argued that the representations occurred subsequent to the signing of the agreements (218A-219A, 268A-269A). The record, however, is to the contrary and is replete with statements that plaintiffs intended to prove that the representations concerning the condition of Loan Committee approval were made both before and after the signing of the commitment contracts (287A-291A). To the extent the District Court precluded plaintiffs from presenting any aspect of their case for estoppel on an erroneous view of the record, the Court committed reversible error.

subsequent to the execution of the contracts such as the meeting of the Loan Committee, the Committee's approval of the loan, the imposition by LFRECC of an additional condition of securing a "take-out" loan and who would be responsible for arranging the "take-out" loan (203A-204A). While conceding that this evidence would not be barred by the parol evidence rule, the District Court ruled that this evidence would be inadmissible on the grounds of relevancy (204A).

Plaintiffs' complaint had requested a refund of $180,000 paid upon the signing of the agreements as a "commitment fee". The court correctly rejected defendants' argument that the $180,000 fee could be retained as liquidated damages for plaintiffs' breach (204A-206A, 279A-280A). Defendants had contended that even if LFRECC's modification of the condition on Loan Committe approval was enforceable, it was plaintiffs obligation to secure takeout financing and their failure to do so constituted a breach (205A). The Court properly held that the imposition of an additional condition of a takeout was unenforceable under § 5-1103 N.Y. Gen. Oblig. Law and the holding of Stanish v. Polish Roman Catholic Union, 484 F.2d 713 (7th Cir. 1973) (205A-206A, 280A). The Court's finding that plaintiffs did not breach their agreements should have disposed of the commitment fee issue. Instead, the Court adopted the argument of

fee was "earned consideration" without ever permitting the jury to inquire into what defendant LFRECC "earned" or what the parties had bargained-for as consideration.

On the issue of whether plaintiffs are entitled to a cancellation of the promissory note on the theory of equitable estoppel, the District Court again decided that the theory of estoppel was inapplicable and ruled that plaintiffs' proof would be barred by the parol evidence rule (209A-212A, 281A-283A). The Court also found that the promissory note was clear and unambiguous (210A, 282A). Moreover, in characterizing plaintiffs' evidence as representations which seek to modify the terms of a promissory note, the Court asserted that even if the representations were true, because they were oral, they would be "legally ineffectual" (211A, 282A).

Statement of Facts

Early in 1972 Stalnaker and Greskovich began investigating the feasibility of constructing a general diagnostic and treatment hospital to serve the Pensacola, Florida community (69A, 140A). The proposed Cordova Doctors Hospital would be located on a five acre site in Pensacola previously purchased by Stalnaker and Greskovich and would provide its attending physicians and their patients with the latest in therapeutic, diagnostic and nursing care (70A).

The hospital concept was discussed with numerous physicians in the Pensacola area and ultimately 12 prominent physicians with various specialties agreed to participate in a partnership to develop the hospital plan (70A, 142A).

By the summer of 1973, the plans had been finalized to a point where efforts were made to secure construction and permanent financing of the hospital project (71A, 140A). In order to operate as a corporate entity seeking financing, G&S was formed on June 27, 1973 as a Delaware corporation authorized to do business in Florida (70A). Richard H. Crowe, Esq. ("Crowe"), an attorney for G&S, was principally responsible for financing arrangements and began contacting numerous brokers and lending institutions on behalf of plaintiffs (7A, 71A, 140A-141A). One of the contacts made by Crowe was defendant LFRECC (7A). By letter dated September 20, 1973, Punia Company, a broker for the plaintiffs, sent a Mortgage Application and exhibits for the Cordova project to John Muhlfeld ("Muhlfeld") requesting LFRECC to review the application and to advise as to LFRECC's interest in the project (71A, 141A).

After several letters between the parties proposing various terms and conditions, a Senior Vice-President of

LFRECC, Roy M. Pollitt ("Pollitt") sent a letter dated December 3, 1973 stating that LFRECC was "pleased to accept your application for a construction loan" in the amount of $6,000,000 for a 36 month term at a rate of 4% over National Bank of Westchester's moving prime rate plus a 3% commitment fee (7A, 19A-20A, 141A). The December 3rd letter further provided that a formal written commitment letter was to be issued pending receipt by LFRECC of various documents from plaintiffs which were to be subject to approval of LFRECC (20A). If plaintiffs agreed to the foregoing terms, they were to pay a "non-refundable" fee in the amount of $20,000 (20A). By the terms of the letter, the payment of this fee obligated LFRECC to complete arrangements for this loan in approximately 45 days and in the event that LFRECC did not do so, the $20,000 fee would be refunded to plaintiffs (20A). This contract to issue a firm commitment was accepted by plaintiffs and $20,000 was transferred to LFRECC by plaintiffs (33A, 141A).

By late December 1973, requested information on the Cordova project had been supplied to LFRECC by plaintiffs (141A-142A). On or about December 26, 1973, Crowe and Stalnaker came to the offices of LFRECC for a meeting with Pollitt and his assistants Brian Bergen and

Muhlfeld to finalize the financing arrangements for the Cordova project (8A-9A, 35A, 143A). At that meeting, various terms of the commitment letters were discussed and representations about the status of the loan were made by Pollitt (9A, 36A, 74A-75A, 143A-144A).

Plaintiffs were presented with two letter agreements for their review and signature: (1) a construction loan commitment and (2) a permanent mortgage commitment (8A-9A, 35A-36A, 74A). The construction loan commitment obligated LFRECC to loan or cause to be loaned to G&S $6,000,000 for the construction of the proposed Cordova hospital (21A-27A, 35A-36A, 143A). The second letter agreement also committed LFRECC to loan or cause to be loaned $6,000,000 for permanent financing upon the completion of the hospital construction (24A-26A). Both letters specifically stated that the "loan had been approved" and that the closing would be dependent upon the satisfaction of a number of conditions, some of which had been enumerated in the December 3, 1973 letter agreement (21A-27A).

An item of much importance was item 3 of the construction loan agreement which provided that the commitment was subject to Loan Committee approval (22A). Before the signing of the letter by Crowe and Stalnaker, Pollitt

had advised the plaintiffs that the Loan Committee would not be able to meet on its scheduled date in December to consider the Cordova submission (74A-75A, 143A). Plaintiffs expressed concern about obtaining formal approval of the Loan Committee both before and after the signing of the commitment agreements (75A, 143A). Pollitt assured them that he had obtained the oral approval of the members of the Loan Committee and that as far as he was concerned this condition had been satisfied (75A, 143A). The obtaining of Loan Committee approval orally from Committee members was within the ordinary course of LFRECC affairs, a fact admitted by Pollitt when he stated in his deposition testimony that there were occasions where oral approval had been obtained from Loan Committee members (75A). The remaining items of both commitment contracts pertained to requirements to be performed by plaintiffs prior to or concurrent with the actual closing of the loans, i.e. the obtaining of title insurance, the payment of closing costs, etc. (22A-26A).

In reliance on the representations by Pollitt that LFRECC had agreed to loan the money, plaintiffs signed the commitment contracts and within 24 hours paid LFRECC an additional $160,000 making the total commitment fee $180,000 ($20,000 had been previously paid) in consideration

for LFRECC's obligation to loan G&S $6,000,000 for construction and permanent financing (9A, 34A, 35A, 144A). Plaintiffs never would have paid this fee had they thought the commitment agreements were not "firm" or subject to subsequent modification by LFRECC (76A).

Upon the finalization of the commitment contracts, plaintiffs sought an advance of the construction monies that LFRECC was committed to loan to plaintiffs (10A, 76A, 144A-145A). As LFRECC would not lend money other than for real estate investments and the closing had not yet occurred, Pollitt suggested that it would be preferable for plaintiffs to obtain personal unsecured loans from a member bank of LFRECC, defendant NBW (76A, 146A). Accordingly, at the December 26th meeting, Pollitt telephoned NBW to advise NBW about LFRECC's commitment to plaintiffs, the status of the Cordova project, and plaintiffs' need for a first advance on the promised construction monies (76A, 146A). At Pollitt's instance, meeting was arranged for Crowe and Stalnaker with NBW officers later in the afternoon of December 26th (76A, 142A, 146A).

Plaintiffs were accompanied by Muhlfeld to NBW where arrangements were made for the advance with John Battista ("Battista"), a loan officer at NBW (76A, 142A). On the express representation from Pollitt that the loan had

been approved and the financing for the hospital project would be imminently forthcoming from LFRECC, NBW modified its customary prohibition against loaning to out-of-state individuals who were not customers of the bank and agreed to provide $300,000 to plaintiffs on an unsecured basis (76A-77A, 146A-147A). Given the unusual circumstances of this advance, Battista had his superior, John W. Kuhn contact the President of LRFECC, James Corcoran, to confirm Pollitt's representations regarding the certainty of the Cordora financing (146A). As reflected in a memo by Battista to Files dated December 28, 1973:

> "Yesterday afternoon Roy Pollitt called on behalf of the principals of the subject requesting that NBW extend a short term $300,000 loan pending the closing of LFRECC's $6,000,000 construction loan on a 167 bed general care hospital to be constructed in Pensacola, Florida .... G & S needs the funds by 12/31 and the urgency was brought about by the fact that LFRECC had cancelled a screening committee meeting scheduled for 12/27 so LFRECC cannot advance any funds yet.
>
> We very specifically stated that were it not for LFRECC we would not consider this request." (77A)

That NBW relied on the representations of Pollitt and treated this loan as an "advance" is further evidenced by the fact that formalities of executing the loan documents were dispensed with (77A, 147A). Stalnaker and Crowe both signed documents, but at that time there was no corporate resolution of G&S or power of attorney from Greskovich (77A,

147A). In fact, NBW neglected to obtain Stalnaker's signature on the guarantee and it was furnished later (77A, 147A). Nonetheless, the $300,000 loan was agreed to by NBW and the funds were transferred shortly thereafter to plaintiffs who expended the funds to further the project (10A, 77A, 148A). Ultimately, NBW assigned the note to LFRECC, thereby confirming the fact that the parties considered the $300,000 loan as a de facto advance from LFRECC to plaintiffs (50A, 77A).

The Loan Committee finally met to consider the Cordova project on January 15, 1974 (78A, 148A). As the minutes indicate, members of the Loan Committee considered the submission package on Cordova, discussed the proposal and ultimately gave a "conditional" approval to the Cordova project (78A). As reflected in the minutes of the meeting:

> "The Cordova Doctors Hospital loan be approved subject to the qualifications shown in the submission, and the securing of an unqualified take-out, by a financially responsible institution." (78A)

There was no reservation either at the December 26th meeting or in either commitment contract that the agreements were subject to any modification or conditional approval by the Loan Committee (78A).

Shortly after the Loan Committee meeting, Pollitt advised plaintiffs of the Loan Committee's resolution and assured them that the securing of a firm take-out or permanent mortgage could be arranged (78A, 148A). Plaintiffs protested as to this assertion of an unbargained-for condition, but having paid LFRECC $180,000, having expended the $300,000 loan and not having other available financing sources, plaintiffs diligently pursued a search for permanent financing (78A).

While Pollitt testified at his deposition it was his job to secure the take-out financing, and while such a take-out was now claimed to be a condition to LFRECC's going forward with the financing, Pollitt did virtually nothing to arrange appropriate financing (79A). Despite plaintiffs' efforts to obtain alternative commitments, none of these contacts nor efforts by LFRECC resulted in the take-out financing required by the Loan Committee (79A-80A). Thus, the financing through LFRECC was stalemated (80A, 149A).

The original $300,000 note was payable on March 1, 1974, but due to the failure of LFRECC to close the loan as planned, both LFRECC and G&S sought an extension of the loan for another 90 day period and, in consideration for the extension, the amount outstanding was to be reduced to $250,000 and a mortgage offered on the land which was to be

the hospital site (80A, 149A-150A). To pay the loan down to $250,000, Pollitt authorized the release of $50,000 from the $180,000 commitment fee being held in escrow (80A, 150A). The fact that the $180,000 was being held in escrow and $50,000 of this sum was used to reduce the plaintiffs' indebtedness to NBW belies the contention that LFRECC had "earned" this fee and indicates that LFRECC was treating the fee as refundable to plaintiffs. Later in April 1974, Crowe requested that the balance of $130,000 held in escrow be refunded to plaintiffs. Although LFRECC refused, Pollitt wrote to Crowe to request that the $130,000 be applied to reduce the outstanding loan at NBW (Plaintiff's Trial Exhibit 36). This letter further illustrates plaintiffs' claim that LFRECC itself did not treat the fee as its own property. Shortly thereafter, NBW made a formal demand by letter dated April 19, 1974 that the balance of the $300,000 loan be paid (34A, 80A). LFRECC subsequently purchased the note from NBW for $262,258.69 (50A).

SUMMARY OF ARGUMENT

The central issues on this appeal are (1) whether a lender is entitled to retain a fee paid by a borrower as consideration for a contract to loan money where the lender refuses to extend the loan and as a result the lender undertook

and performed no obligations under the agreement; and (2) whether the parol evidence rule, the statute of frauds and rulings on relevancy preclude the introduction of evidence to clarify ambiguities, to show the intention of the parties at the time they entered into the commitment contracts and the promissory note and to prove a case of equitable estoppel.

The District Court's refusal to admit any evidence on plaintiffs' right to a refund of the commitment fee constituted egregious error. Having concluded that defendants were not obligated to go forward with the agreed-to loan by failing to grant approval, a condition precedent to LFRECC's obligation, the Court awarded the fee to defendants as earned consideration. In essence the Court held, as a matter of law, that plaintiffs' paid $180,000, not for LFRECC's willingness to make a loan, but rather merely for LFRECC's agreement to present the loan to its Loan Committee for approval. This holding, we submit, was clear error. Plaintiffs simply cannot be held to have paid $180,00 to give LFRECC an option to grant a loan. The Court made this ruling without proof as to the intention of the parties, LFRECC's treatment of the fee as plaintiffs' money held in escrow or the custom of this lender in refunding commitment fees on other similar transactions when the failure to close was attributable to the fault of the lender. The result was Draconian at best.

The District Court's evidentiary rulings wrote the doctrine of equitable estoppel out of the law. By the very nature of a claim or a defense of estoppel, the party asserting it must prove that representations were made and relied upon to the party's detriment. By the mere labelling of all of plaintiffs' proffered representations as "modifications" or "at variance with the terms of a written document," the District Court effectively limited the proof to justify a directed verdict. In so ruling the District Court denied plaintiffs their fundamental right to present an aspect of their case which was grounded in the earliest pleadings in this case. Apparently realizing the unreasonableness of this position, the District Court modified its ruling on plaintiffs' estoppel theory by holding that only representations made prior to or contemporaneous with the written documents would be excluded and disputed plaintiffs' contention that it had proof that operative facts of estoppel occurred after as well as before the signing of the written documents. While plaintiffs submit that the timing of a representation is not crucial to proving a case for estoppel, even adopting the District Court's own test, the record is replete with representations and other conduct of defendants subsequent to the signing of the written documents which should have been admitted in evidence. Had the District Court properly admitted plaintiffs' evidence and submitted

the case to the jury, plaintiffs would have proven their right to a refund of the commitment fee, the right to cancel their indebtedness on the promissory note and defendants' liability for damages for their breach of the commitment contracts.

POINT I

THE COURT ERRED IN RULING AS A MATTER OF LAW THAT DEFENDANTS WERE ENTITLED TO RETAIN THE $180,000 COMMITMENT FEE

The Court's determination that LFRECC as a matter of law was entitled to retain the $180,000 commitment fee as earned consideration has no legal precedent and was in complete disregard of the critical facts in this case. The ruling has the untenable result of imposing a harsh and unreasonable penalty on plaintiffs the Court has found blameless, while at the same time awarding a bounty to a defendant who has incurred no obligations, performed no duties and, in fact, breached the agreement. Plaintiffs submit that the fee may not be kept as liquidated damages since plaintiffs did not breech the agreement as it was LFRECC which failed to go forward with the loan. Moreover, even if plaintiffs in some way can be held to have breached the commitment contracts, the $180,000 commitment fee may not be had as proper liquidated damages as the fee is excessive and unreasonable. Plaintiffs further submit that to the extent that the Court determined that the defendant was entitled to this consideration without incurring any obligation on its part to close the loan, defendants' promise was illusory and the agreement thereby rendered unenforceable. Defendants, therefore, are not entitled to retain the $180,000

fee. Finally, plaintiffs submit that defendants did not receive nor may they retain the fee as "earned consideration." It was never the intention of the parties that the fee be received as consideration for anything other than LFRECC's readiness to go forward with the loan.

A. Defendants Are Not Entitled To Retain The Commitment Fee As Liquidated Damages or As Earned Consideration

The District Court correctly ruled that since plaintiffs were not in breach, defendant could not retain the commitment fee as liquidated damages (206A). The Court clearly erred, however, in finding that defendants were entitled to retain the fee, as a matter of law, as "earned consideration" (207A). Nowhere in the agreement is the fee termed "consideration" nor did the parties intend it to be received as consideration. Moreover, the record is devoid of any [illegible]ts which support a finding that defendants did anything to earn such consideration.

1. Defendants are not entitled to liquidated damages.

It is hornbook law that the term "liquidated damages", even where appropriate, means an amount designated in advance to be paid to one of the parties to compensate for loss or

injury "which will follow from a breach of contract by the other party." Thus, it is clear that liquidated damages may not be recovered against a party in absence of breach. 14 N.Y. Jur, Damages § 155, at 3.

According to the commitment contracts, LFRECC was entitled to retain the $180,000 fee solely as "liquidated damages". Implicit in this language is the underlying assumption based in law that such "liquidated damages" would be recoverable by LFRECC only in the event that plaintiffs breached. This construction not only flows from the express terms of the agreement but also from the conduct of the parties.* Plaintiffs signed the agreement and paid the fee solely on the understanding that there was a firm obligation on the part of LFRECC to secure the loan and to hold the loan in readiness. In order to insure plaintiffs' fulfillment of its obligations, LFRECC required the fee to be retained as liquidated damages in the event plaintiffs breached. That plaintiffs never breached the agreement is not disputed by the Court (206A). Therefore, there is no theory of law which would support defendant's claim for liquidated damages.

---

* The Court ruled inadmissible evidence offered by plaintiffs to clarify the meaning of the contractual terms and the intentions of the parties. Plaintiffs' evidence would have shown that defendant held the fee in escrow and treated it as refundable to plaintiffs. Refunding fees when loans fail to close due to the lender's refusal to close is customary in the banking industry. Indeed, plaintiffs were prepared to show that defendant, in fact, on numerous occasions had returned such fees to borrowers when loans failed to close. (253A, Rec. D. 18)

Moreover, to the extent that liquidated damages may be recoverable in the event of a breach by plaintiffs, the sum stipulated in the commitment agreement, $180,000, is clearly a penalty and is not properly designated as liquidated damages. It is well established that liquidated damages must reasonably reflect the amount of loss incurred by a breach. Curtis v. Van Bergh, 161 N.Y. 47, 55 N.E. 398 (1899). Thus, a provision for liquidated damages will be deemed a penalty and will not be upheld where the amount stipulated is disproportionate to the probable loss from the breach. Jarro Building Industries Corp. v. Schwartz, 54 Misc.2d 13, 281 N.Y.S.2d 420 (2d Dep't 1967); see also, 14 N.Y. Jur, Damages § 162 at 16. In the instant case, the sum stipulated is clearly excessive and unreasonable and must, therefore, be construed as a penalty and not liquidated damages. LFRECC has not offered, nor could they offer, any evidence which would support a finding that the fee was reasonable and proportionate to probable damages defendant might suffer if plaintiffs would not go forward with the loan. The fees, therefore, may not be retained by defendant and plaintiffs are entitled to have them refunded.

2. Defendants are not entitled to retain the fee as earned consideration.

The Court declined to accept the clear meaning of the term "liquidated damages" and ruled as a matter of law,

without admitting any evidence to the contrary, that defendant LFRECC was entitled to retain the $180,000 as "earned consideration" (207A).* The term consideration appears nowhere in the agreement. The agreement merely stated that the fee may be "retained as liquidated damages". It cannot be both.

Plaintiffs submit that it is wholly inappropriate for the Court to supply a meaning which is not found on the face of the agreement and yet deny the admission of evidence on the issue of the meaning of the terms and intention of the parties. The court should not be permitted to usurp the role of the jury by merely declaring that its ruling is as a matter of law.

Even assuming arguendo that the Court's interpretation of the agreement is valid, defendant, having failed to perform their bargained for obligation, --the granting of a loan--, is not entitled to retain the fee as earned consideration. A lender has no right to retain a special deposit or commitment fee where the loan failed to close

* The entire agreement to pay the $180,000 consists of no more than several lines in the transmittal letter which accompanies the commitment agreement. The letter provided:

> "It is expressly agreed and understood that this $180,000 fee is hereby earned and should for any reason this loan fail to close, will be retained by Lincoln First Real Estate Credit Corporation as liquidated damages" (27A).

due to the inaction of the lender. Pasadena Associates v. Connor, 460 S.W.2d 473 (Tex. 1970). Moreover, where a lender has been permitted to retain such a fee, the circumstances showed that the borrower had breached its obligations while the lender was willing to perform and could show damages reasonably estimatible as the liquidated amount attributable to the borrower's default. See e.g., Regional Enterprises Inc. v. Teachers Ins. & Annuity Ass'n of America, 352 F.2d 768 (9th Cir. 1965); Paley v. Barton Sav. & Loan Ass'n, 82 N.J. Super 75, 196 A.2d 682 (1964); Boston Road Shopping Center, Inc. v. Teachers Insurance and Annuity Association, 13 App. Div.2d 106, 213 N.Y.S.2d 522 (1st Dep't) aff'd 11 N.Y.2d 831, 227 N.Y.S.2d 444, 182 N.E.2d 116 (1962).

In ruling that the fee was earned consideration, the Court provided very little insight into the basis of that ruling. What is apparent, however, is that this ruling was at variance with the record. First, the Court declared that "the $180,000 was part consideration for defendants' securing the loan" (207A). It is clear from the record, however, that defendants never secured the loan, and, in fact, the Court ruled it had no binding obligation to do so. Thus, defendants can in no way be found to have earned the consideration by having "secured the loan." Second, there

is no evidence whatsoever demonstrating what additional performance would have entitled defendants to the remaining "part" of this consideration.

The authority offered to the District Court by LFRECC, Boston Road, supra, is plainly distinguishable. There the court ruled a $22,000 fee was earned, because the lender was required to hold the loan amount ($1,100,000) in readiness over a 15-month period. The instant case is not at all analogous. Hardly one month had elapsed between the time the commitment agreement was entered into and the time when LFRECC refused to go forward with the loan. Moreover, defendant LFRECC did not allege, much less prove, that it ever held the $6,000,000 in readiness. In short, there is no evidence to support a finding that LFRECC did anything at all to "earn" this consideration. Therefore, plaintiffs are clearly entitled to the refund of the $180,000 paid as a commitment fee.

B. As Interpreted By The Court, The Commitment Agreements Lack Mutuality And, Therefore, Defendants Are Not Entitled To Retain The Commitment Fee

It is a well established rule in New York that a contract which is not mutually binding lacks consideration

and is, therefore, unenforceable. Topken, Loring & Schwartz, Inc. v. Schwartz, 249 N.Y. 206, 163 N.E. 735 (1928); Schlegel Mfg. Co. v. Cooper's Glue Factory, 231 N.Y. 459, 132 N.E. 148 (1921); Sidrane v. F.D.R. Realty Corp., 61 N.Y.S.2d 828, affirmed, 296 N.Y. 357 (1947); Brooklyn Union Gas v. Jimenez, 82 Misc.2d 948, 371 N.Y.S.2d 289 (Civ. Ct. Kings Cty. 1975). Thus, a contract is not enforceable where one party to a contract, may choose to perform the bargained-for consideration solely at its discretion. Topken, Loring & Schwartz, Inc. v. Schwartz, supra; Sidrane v. F.D.R. Realty Corp., supra. Further, a promise to perform which is not binding is said to be "illusory" and does not constitute valid consideration. See Corbin on Contracts § 160 at 61-66 (1963).

Applying these basic contract principles to this case, the bargained-for consideration was lacking and defendants were, therefore, not entitled to retain the $180,000 fee. The commitment contract stated that the "loan was approved" subject to "Executive Loan Screening Committee approval" (22A). According to the interpretation of the contract by the District Court, LFRECC was free to decide to revoke its obligations by having its Loan Committee refuse to grant approval to a loan. Thus, while plaintiffs gave valuable consideration in the form of a commitment fee

and bound themselves to close the loan or be liable for beach, the District Court found defendants were not likewise bound and could repudiate the agreement at will. Such a contract clearly lacks mutuality and should not be enforced.

In Topken, supra, a leading case on point, the New York Court of Appeals held unenforceable a contract between a corporation and its employee wherein the employer agreed to purchase and the employee agreed to sell any shares of stock of the corporation which he might hold at the time his employment terminated. The Court found the contract lacked mutual consideration since the employee's obligation to sell was fixed but the corporation might or might not choose to perform depending on the existence of adequate surplus at the time of performance. Thus, the Court, recognizing the inherent inequity of such an agreement, stated:

> "One of the promises may or may not be good, the same as if a discretion were left to one of the parties to perform or not perform. Under such circumstances there is no consideration and the contract cannot be enforced." 249 N.Y. at 211.

The reasoning and holding of Topken governs the case at bar. Since the District Court found that defendants were free to withhold approval, their promise to provide the bargained-for financing was illusory and totally lacking in mutual consideration.

The result which follows from the Court's ruling is not only without legal basis, it is clearly unjust. The Court would permit a lender to enter into a commitment agreement to loan money and collect a substantial fee without incurring any obligations on its part. It is even more shocking to consider that the Court would permit the lender to retain the fee where it was ultimately the lender's refusal to go forward which prevented the loan from closing. If the District Court is upheld, the result would be that once a borrower has entered into a binding agreement with a lender, the borrower not only surrenders all of its rights, but it alone incurs any obligations. Certainly, such an inequity cannot be countenanced. Justice requires that commitment fees be returned to plaintiffs.

POINT II

THE DISTRICT COURT ERRED IN DIRECTING A VERDICT DISMISSING PLAINTIFFS' COMPLAINT FOR DAMAGES AND FOR CANCELLATION OF THE PROMISSORY NOTE AND AWARDING DEFENDANTS JUDGMENT ON THEIR COUNTERCLAIM

As previously discussed, the Court's holding that defendants were excused from the contract and entitled to recovery on the promissory note as a matter of law was based on three erroneous evidentiary rulings: (1) the Court erred in excluding parol evidence of representations made to plaintiffs before, contemporaneous with and after the signing of the commitment contracts and the promissory note; (2) the Court erred in ruling that evidence concerning events which occurred subsequent to the signing of the commitment contracts was irrelevant; and (3) the Court erred in ruling that the term "approval" was unambiguous and refusing to admit evidence to clarify the understanding of the parties with respect to commitment contracts and promissory note.

In the supplemental memorandum, opening statement and argument on the motion for a directed verdict, plaintiffs repeatedly urged that they be permitted to offer evidence as to what the mutual understanding was of the terms and conditions of the commitment contracts and the promissory note. Plaintiffs were prepared to prove the following salient facts: (1) that they were advised that

the Loan Committee had approved the loan; (2) that LFRECC is estopped to deny that the condition of approval was waived or satisfied; (3) alternatively, that when the Loan Committee gave a conditional approval on January 15, 1974, the condition of securing a take-out was to be performed by LFRECC; and (4) that the failure to close the loan was attributable to LFRECC's failure to perform its obligation to secure a take-out. Had the District Court properly allowed plaintiffs to introduce this evidence and submit their case to the jury, plaintiffs could have proved that LFRECC breached the commitment agreements, was not entitled to recovery on the promissory note and was liable to plaintiffs for damages.*

A. The Terms Of The Commitment Contracts Are Ambiguous

Item three of the construction loan commitment provides that "this loan has been approved subject to ... Executive Loan Screening Committee approval" (22A). Plaintiffs were denied an opportunity to prove that the term "approval"

---

* Plaintiffs' reliance on the theory of estoppel applies with equal force to their right to a refund of the commitment fee. The representations made by defendants concerning the condition of Loan Committee approval and the certainty of the loan were the sole reason for the payment of the fee. In addition, both parties understood that the commitment fee was paid to secure a firm, unconditional obligation to make financing available and that it was to be retained solely as liquidated damages in the event that plaintiffs breached. As the court properly found no breach on plaintiffs' part, the fee must be refunded. See Point I *supra*.

is subject to a variety of interpretations and could have meant oral approval.

It is a general rule in the construction of contracts that the contract is to be read in light of the circumstances existing at the time of its making. As a leading New York commentary summarizes:

> "... In order to determine the nature of the thing promised, recourse to the circumstances attending the execution of the writing may be had. Thus, in the interpretation of an agreement, the surrounding circumstances at the time it was made should be considered for the purpose of ascertaining its meaning. A contract is to be construed in the light of the situation of the parties at the time it was made." 10 N.Y. Jur. § 219 Contracts at 131.

The foregoing rule that the surrounding circumstances should be considered in the interpretation of a contract applies with particular force when the language is susceptible to more than one meaning. Solomon Tobacco Co. v. Cohen, 95 App. Div. 297, 88 N.Y.S.64 (1st Dep't 1904). In such cases, ambiguity on the face of the contract creates

a question of fact.* This fact question can only be resolved by testimony to show the surrounding circumstances and the intent of the parties upon the execution of the contract. As New York Jurisprudence states:

> "... when different inferences may fairly be drawn as to the meaning and effect of the written language used, that the relation of the parties and the surrounding circumstances are to be considered by the jury in arriving at their intention." 10 N.Y. Jur., Contracts § 221 at 133.

Thus, in Kinderman v. Kinderman, "profit" was a disputed term of the contract. 183 N.Y.S. 897 (Sup. Ct. Bronx Cty., 1920). Although this term is one of obvious and common usage, the court nonetheless permitted the admission of parol evidence to clarify what the parties intended the

---

* As New York courts have long recognized, written words may "have more than one meaning" and any doubts as to meaning must be settled by extrinsic proof. Nash v. Gay Apparel Corporation, 9 App. Div.2d 345, 193 N.Y.S.2d 246 (1st Dep't 1959). The question of what meaning should be given to the words of a contract is ordinarily a question of fact and should only be decided by the court where no reasonable person would determine the issue in any way but one. W.S. Hayes, Inc. v. Public Service Mutual Ins. Co., 12 App. Div. 2d 989, 212 N.Y.S.2d 89 (4th Dep't 1961); see also 3 Corbin on Contracts, § 554 at 222. While the traditional view is that the ambiguity must be apparent from the "four corners" of the writing, the more modern trend which has been adopted by at least one New York court is that "any evidence of the parties' negotiations and of any other relevant external circumstances [is admissible] in order to ascertain whether a written contract is ambiguous." Todem Homes, Inc. v. Freidus, 84 Misc.2d 1023 374 N.Y.S.2d 923 (Sup. Ct. Suf. Cty. 1975); see also, Anno. Ambiguity in Contracts - Extrinsic Evidence, 40 A.L.R.3rd 1384, Sec.4.

term "profits" to mean. Similarly, in this case, the term "Executive Loan Screening Committee approval" is ambigous and extrinsic evidence is required to determine the meaning and effect of the written language and to clarify the intent of the parties.

Moreover, the conduct of the parties subsequent to the execution of the commitment letters provides a practical construction to any ambiguous terms. Kinderman v. Kinderman, supra; see 10 N.Y. Jur, Contracts § 221 at 133. Plaintiffs were improperly thwarted in their efforts to introduce evidence that after the signing of the contracts, LFRECC contacted NBW to arrange for the $300,000 advance and that plaintiffs relied on representations made by defendants in executing the promissory note and guarantees. Thus, the District Court unquestionably erred in precluding plaintiffs' evidence on subsequent events as "irrelevant."

B. The District Court's Erroneous Evidentiary Rulings Precluded Plaintiffs from Presenting Their Case for Estoppel

Even if the District Court correctly held plaintiffs were precluded from proving (1) the oral approval of the Loan Committee; (2) that LFRECC had waived the formal approval; or (3) that LFRECC was estopped from denying the approval,

plaintiffs should have been permitted to introduce evidence estopping LFRECC from collecting on the $300,000 promissory note.

Plaintiffs sought to introduce evidence to prove that their obtaining of the $300,000 loan was predicated on oral representations by LRFECC that the condition of Loan Committee approval had been satisfied. Where a party makes a representation or engages in conduct which excuses performance of a condition of a contract and another party relies thereon to its detriment, the former party cannot subsequently revoke its waiver or excuse and treat the non-performance of the condition as a breach of contract. Imperator Realty Co. v. Tull, 228 N.Y. 447 (1920).

It is the law of New York that parol evidence is not excluded where equitable estoppel or waiver of condition is at issue. Imperator Realty Co. v. Tull, 228 N.Y. 447 (1920); New York Conference Association of 7th Day Adventists of Syracuse, New York v. 915 James Street Associates, Ltd., 38 App. Div.2d 235 (4th Dep't 1972). In Imperator Realty, the New York Court of Appeals established the rule that a promisor who issues a written contract subject to a condition for which the promisor has excused performance cannot invoke the parol evidence rule to preclude testimony

on the excuse of the condition. See also Wood v. American Fire Insurance Company, 149 N.Y. 382, 44 N.E. 80 (1896); N.Y. Jur, Contracts § 297 at 253-54.

The parties in Imperator Realty had entered into a written contract for the exchange of pieces of real property. A material condition contained in the contract was that the seller cure the property of all building code violations prior to closing. At the time of the execution of the contract, it was orally agreed by the parties that in lieu of discharging any of the existing or potential violations on either property, either party could deposit with a certain title insurance company sufficient cash to discharge the violations. Thus, in essence, the oral agreement did not purport to vary the condition of curing the violations, but rather altered the mode of performing that condition.

Prior to the closing, defendant repudiated the written contract claiming plaintiff's failure to perform the condition precedent. Plaintiff argued that defendant should be estopped from asserting the condition based on the oral agreement, and on this theory sued for breach of contract for defendant's refusal to close the transaction.

At the trial, the jury vindicated the plaintiff in all respects, rendering a verdict in its favor. On appeal

from the judgment entered on the verdict, defendants claimed that it was error under the doctrine of the parol evidence rule to admit testimony of the oral modification. The Court of Appeals in a well reasoned opinion with concurrence by Judge Cardozo upheld the trial court. The Court held that admission of parol evidence of the waiver of the condition to prove plaintiff's theory of estoppel was not legal error.

The Court reasoned that the oral agreement was neither inconsistent with the written contract nor did it substitute a new contract for any material part of the written contract. Relying upon the rule articulated in Thomson v. Poor, 147 N.Y. 402, 409 (1895), the Court quoted:

> "We know of no principle of law which will permit a party to a contract, who is entitled to demand the performance by the other party of some act within a specified time and who has consented to the postponement of the performance to a time subsequent to that fixed by the contract, and where the other party has acted upon such consent and in reliance thereon has permitted the contract time to pass without performance, to subsequently recall such consent and treat the non-performance within the original time as a breach of the contract. The original contract is not changed by such waiver, but it stands as an answer to the other party who seeks to recover damages for non-performance induced by an unrecalled consent." 228 N.Y. at 452. (Emphasis added.)

Further, Judge Cardozo's concurrence illustrated the principle with a common sense hypothetical which underscores the justice of the rule:

"... The defendant by his conduct has brought himself within the ambit of this principle. His words did not create a new bilateral [or unilateral] contract .... They did, however, constitute the continuing expression of a state of mind, a readiness, a desire, persisting until revoked. A seller who agrees to change the wall paper of a room ought not to lose his contract if he fails to make the change through reliance on the statement of the buyer that new paper is unnecessary and that the old is satisfactory...." 228 N.Y. at 458.

The majority opinion noted that the fairness of allowing the plaintiff to provide the facts of estoppel by parol evidence was even more compelling since it was to the mutual advantage or convenience of both parties to waive or excuse the condition.

In thus affirming the settled law of New York that parol is admissible to prove the facts of estoppel or waiver, the Imperator Court also made clear that the foregoing rule obtains even where the underlying contract involves an interest in real property and, is therefore subject to the statute of frauds. As was summarized by Judge Cardozo:

"... The Statute of Frauds was not intended to offer an asylum of escape from that fundamental principle of justice. An apposite precedent is found in Thomson v. Poor, (147 N.Y. 402). In deciding that case, we put aside the

question whether a contract within the Statute of Frauds could be changed by spoken words. We held that there was disability, or as we styled it, estoppel, to take advantage of an omission induced by an unrevoked consent." Id. at 457-58 (citations omitted).

Finally, Imperator articulated an additional rule relevant to the instant case. Where the issue of estoppel to assert a condition is raised, it is proper that the jury, as the finder of fact, decides whether the disputed conversation allegedly forming the basis of the estoppel did in fact occur. Id. at 450.

Imperator is controlling in this case. The proffered testimony by plaintiffs would have shown that they were advised the condition of "approval" had been satisfied. Obviously, satisfaction of a condition in no way contradicts the existence of the condition expressly stated in the parties' agreement. Thus the facts of this case are similar to those of Imperator where the Court admitted parol evidence to prove an oral agreement concerning the performance of a condition of the written contract.* Furthermore, Imperator precludes the

---

* Similarly, in this case as in Imperator, the fairness of allowing plaintiffs to prove the facts of estoppel or waiver is highlighted by virtue of the mutual advantage afforded the parties by their oral understanding: Plaintiffs required financing before the end of the year and forebore to seek alternate financing in consideration of an

(footnote continued)

invoking of the statute of frauds where plaintiffs seek to prove these facts of estoppel and waiver.

The District Court's rejection of plaintiffs' estoppel theory on the basis that the Court believed all the alleged representations occured before the signing of the commitment contracts is legally and factually incorrect (278A-279A). As was pointed out to the District Court in oral argument, the case of New York Conference Association of 7th Day Adventists, *supra* (relying on *Imperator*), makes clear that the estoppel can relate to an oral agreement or waiver made *contemporaneous* with the execution of the written contract (177A-178A). 38 App. Div.2d at 236. Moreover, even if the District Court's ruling to permit the introduction of oral representations only when they are made subsequent to the execution of the written agreements is applied, plaintiffs clearly come within this rule. Despite the District Court's insistence to the contrary, the pre-trial order, plaintiffs' trial memorandum, requests to charge, opening statement, and argument on the motion for a

---

(footnote continued)

immediate firm commitment. Defendants likewise benefited from issuing this commitment by receiving the valuable consideration of $180,000. It would be manifestly unjust to preclude plaintiffs' evidence as to representations made to them concerning the condition of the Loan Committee approval, representations which were the sole reason for the payment of the $180,000 commitment fee.

directed verdict all repeatedly state that the representations concerning waiver or excuse of the condition of Loan Committee approval occurred before, contemporaneous with and after the signing of the commitment agreements. Indeed, plaintiffs argued that it was not until after the contracts had been signed and the commitment fee paid that plaintiffs requested an advance on the construction monies. It was at that time that Pollitt telephoned NBW and made certain representations concerning the certainty of the loan. Subsequently, NBW decided to alter its customary prohibition of lending to non-customers only after receiving additional assurances from the President of LFRECC that the loan monies would be forthcoming. The District Court had no basis to deny that these representations or conduct occurred subsequent to the signing of the contracts.

Furthermore, the District Court's awarding judgment to defendants for recovery on the promissory note was also based on an erroneous application of the parol evidence rule. The Court found that the promissory note was "clear, unambiguous and definite on its face' and that "parol evidence of prior or contemporaneous statements contradicting the terms of the written instrument are as a matter of law inadmissable" (282A). Plaintiffs again submit that the District Court miscontrued plaintiffs' effort to prove the facts of estoppel as a purported modification of a written contract.

Plaintiffs accepted the loan on the express representations by defendants made before, contemporaneous with and after the signing of the contracts that the construction monies would be forthcoming. The monies from NBW were utilized to pay off expenses incurred on the project and to permit further constuction on the site. The indebtedness for which LFRECC has interposed a counterclaim is the direct result of LFRECC's own conduct upon which plaintiffs relied to their detriment. The equitable doctrine of unclean hands requires that defendants be estopped from asserting their claims on the note, even if defendants are not otherwise liable in damages.

As stated at length supra at 36-43, parol evidence is admissable to prove the facts of estoppel. The doctrine is fully applicable to the inducement to extend a promissory note. New York Conference Association of the 7th Day Adventists v. 915 James St. Associates, supra (mortgagee seeking to recover indebtedness estopped from denying validity of contemporaneous oral agreement); Limkin v. Gulde, 205 N.Y.S.2d 658 (Sup. Ct. Nassau Cty. 1960) (landlord who made oral representation which induced tenant to lease property estopped to deny truth of representation). Thus, the representations made by defendants are admissable not to vary or modify the terms of the note, but to prove the facts of

estoppel. Were the District Court not reversed on this ruling, estoppel as a defense to a promissory note could never be proven.

In sum, defendants' attempt to preclude plaintiffs from their right to present their case on estoppel is without factual or legal support. The doctrine of equitable estoppel by definition requires proof of oral representations or conduct upon which plaintiffs relied to their detriment. That doctrine is fully applicable to contract cases. Thus, it follows that evidence extrinsic to a contract must be admitted to prove the facts of estoppel. If the District Court's position were the prevailing law, estoppel with respect to a provision contained in a written document could never be proven in a contract case. Crippling the doctrine of estoppel under the guise of the parol evidence rule is unwarranted and can only result in gross injustice. As the eminent commentator on equitable jurisprudence has stated:

> "the parol evidence rule is a rule which should not be applied so as to work injustice." Pomeroy, Equity Juris., § 858 at 324.

CONCLUSION

For the foregoing reasons, plaintiffs-appellants respectfully request that this Court reverse the District

Court's directed verdict for defendants-appellees dismissing the complaint and awarding judgment on the counterclaim and remand this action for a new trial.

Respectfully submitted,

WILLKIE FARR & GALLAGHER
Attorneys for Plaintiffs-Appellants
1 Chase Manhattan Plaza
New York, New York 10005
(212) 248-1000

MICHAEL B. TARGOFF
PAULA J. MUELLER,
Of Counsel

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of this Court, hereby certifies that two (2) true copies of the foregoing Brief have been duly served, by hand, on Raymond P. O'Keefe, McCarthy, Fingar, Brown & Glatthaar, Counsel for the Appellees in the within appeal on the 3rd day of January, 1977.

Dated: January 3, 1977

Paula J. Mueller

Paula J. Mueller